Supreme Court, U.S.
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No. 97-1786

In The

Supreme Court of the United States

October Term, 1997

DELROY R. BLASKE,

Petitioner,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The parent companies of Respondent are UNUM Holding Company and UNUM Corporation. Respondent has no nonwholly owned subsidiaries.

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I

Respondent UNUM Life Insurance Company of America ("UNUM") submits this Brief in Opposition to Petitioner Delroy R. Blaske's Petition for a Writ of Certiorari. As set forth below, Petitioner's request for a Writ should be denied for several reasons. Initially, Petitioner failed to raise the issue which forms the basis of his Petition in his appeal to the Eighth Circuit Court of Appeals. In addition, the decision of the Eighth Circuit Court of Appeals is not in conflict with the decisions of the Ninth Circuit Court of Appeals. Finally, the Eighth Circuit's decision to affirm the District Court grant of summary judgment to Respondent is not in error.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S QUESTION FOR REVIEW WAS NOT PRESENTED TO THE EIGHTH CIRCUIT COURT OF APPEALS OR THE DISTRICT COURT.

Petitioner's Writ of Certiorari should be denied because he did not present his Question Present for Review to either the Eighth Circuit Court of Appeals or the District Court for consideration. Initially at the District Court, Respondent moved for summary judgment asserting that Petitioner's claim for long term disability benefits should be dismissed, in part, because his claims were time-barred pursuant to the policy of long disability coverage issued by Respondent to Petitioner (the "UNUM Policy").

In response to Respondent's motion, Petitioner argued that a dispute concerning the date he became disabled created an issue of material fact. In addition, Petitioner argued that since he was disabled, the tolling provisions of a Minnesota statute applied precluding application of any limitations period. The

District Court rejected Petitioner's arguments and determined that his claims were time-barred under the UNUM Policy and a three-year statute of limitations period in a Minnesota statute.[1]

Petitioner appealed the District Court's decision to the Eighth Circuit Court of Appeals. At the Eighth Circuit, Petitioner similarly argued that his claims were not time-barred because the District Court erred in determining Petitioner's date of disability and erred in failing to apply the tolling provisions of a Minnesota statute. The Eighth Circuit affirmed the District Court. (*See* Brief of Appellant at 23-29.)

In his Petition for a Writ of Certiorari, Petitioner identifies the following Question Presented for Review:

> Does the applicable statute of limitations for a claim for disability benefits governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et. seq. ("ERISA"), act to bar the claim of the Plaintiff-Appellant in its entirety as opposed to simply barring a claim for monthly benefits falling outside the period of limitations?

Clearly, the issue stated in the Petition was not briefed, argued or decided by either the District Court or the Eighth Circuit Court of Appeals. Unlike his arguments to the District Court and Eighth Circuit, Petitioner now attempts to create a distinction between time-barred benefits within the three-year limitations period and time-barred benefits "outside" the three-year period.

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1. As noted by Petitioner, Respondent's motion for summary judgment was also based on his failure to satisfy the notice and proof of claim provisions in the UNUM Policy. While the District Court found that Petitioner's claims should also be dismissed because his failure to satisfy those provisions, the Eighth Circuit did not reach that issue and it is not part of Petitioner's Writ. Accordingly, no further reference is made to that issue.

Essentially, Petitioner frames the issue in this manner to shoe horn his case into the Ninth Circuit's holding in *Nikaido v. Centennial Life Ins. Co.* 42 F.3d 557 (9th Cir. 1994) (under Centennial Life policy, three-year statute of limitations does not bar entire claim for disability benefits since each month of continuing disability creates a new cause of action with a new statute of limitations period). However, regardless of Petitioner's rationale for modifying his argument, his failure to raise the Question Presented for Review to the Eighth Circuit Court of Appeals precludes consideration by the United States Supreme Court.[2]

Finally, as discussed more fully below, to the extent a conflict exists between the Circuits with respect to the Question Presented for Review, Petitioner's failure to raise this issue prior to his Petition undercuts his argument for review pursuant to Supreme Court Rule 10(a). Indeed, it is counterintuitive to suggest that an inconsistency exists between the Circuits when the issue in conflict was never presented, argued or decided by the Eighth Circuit Court of Appeals. For this reason alone, the Petition for a Writ of Certiorari should be denied.

II.

THERE IS NO CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS.

In his Petition, Petitioner's claimed justification for review of the Eighth Circuit's decision is a conflict between the Eighth and Ninth Circuits as to interpretation of the limitations provisions in ERISA-regulated policies. Essentially, Petitioner

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2. As additional evidence of his failure to raise the issue below, Petitioner did not reference or cite *Nikaido v. Centennial Life Ins. Co., supra*, in his appellate brief. (*See* Brief of Appellant at 23-29.)

argues that *Nikaido v. Centennial Life Ins. Co.*,[3] *supra*, contains a holding which is in conflict with the Eighth Circuit's decision in this matter. Petitioner's argument is without merit.

In *Nikaido*, the Ninth Circuit considered whether a claim for disability benefits pursuant to a policy issued by Centennial Life Insurance Company was time-barred by a statute of limitations. The applicable limitations period in the Centennial Life policy was three years from the time proof of loss was due. Importantly, the Centennial Life policy provided in its notice and proof of claim provisions that claimants were to provide submission of proof for "each period for which the company is liable." 42 F.3d at 560.

Based upon the "each period" language of the Centennial Life policy, the Ninth Circuit determined that claims falling outside the three-year limitations period were not time-barred. The Ninth Circuit reasoned that since claimants were responsible to provide proof of loss for each month — "each period" — of a continuing disability, a new cause of action with a new three-year statute of limitations period also began each month. *Id.*

The UNUM Policy involved in the present case does not contain a provision requiring claimants to provide proof of a continuing disability each month. Instead, the UNUM Policy requires "proof of continued disability and regular attendance of a physician within 30 days of the date we request proof."

This distinction in policy language is dispositive in this case. In *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998), the Ninth Circuit itself specifically refused to apply

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3. Petitioner misidentifies the defendant in *Nikaido v. Centennial Life Ins. Co.* as "Continental Life Insurance Company." Petitioner similarly misidentifies the policy in that case as a "Continental Life" policy.

the limitations rule it espoused in *Nikaido* to a UNUM policy. In that case, the Ninth Circuit reasoned that:

> [t]he *Nikaido* holding was based on the particular contract language at issue in that case. It simply does not apply to the proof-of-loss provision in the UNUM policy, which involves different language.

Id. at 944.

The UNUM Policy provision in this case is identical to that in *Cisneros* and, contrary to Petitioner's claim, the *Nikaido* rule could not apply. Accordingly, even if Petitioner had properly presented his Question for Review to the Eighth Circuit, there is no conflict with the Ninth Circuit. Therefore, Petitioner's claim of conflict between the Circuits does not provide justification for further review of this matter.

III.

THE EIGHTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT.

The final reason Petitioner's Writ for Certiorari should be denied is that the Eighth Circuit was correct in affirming the District Court's decision to dismiss Petitioner's action. ERISA contemplates reference to the most analogous state-law statute of limitations in an action to recover plan benefits. *Adamson v. Armco, Inc.*, 44 F.3d 650, 652 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3230 (U.S. Oct. 2, 1995).

Minnesota has a three-year statute of limitations applicable to claims for insurance benefits. Minn. Stat. § 62.A.04, Subd. 2(11). The UNUM Policy has a three year statute of limitations. In affirming the District Court, the Eighth Circuit determined

the limitations provision in the UNUM Policy was "more liberal than the Minnesota Statute." For his part, Petitioner has failed to provide any reason why he could not commence his claim in a timely manner. Accordingly, the Eighth Circuit was correct in affirming the District Court.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should deny Delroy Blaske's Petition for a Writ of Certiorari in this matter.

Respectfully submitted,

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